No. 15,962

United States Court of Appeals

For the Ninth Circuit

VUKA RADOVICH STEPOVICH, Executrix of the Estate of Mike Stepovich, deceased,
Appellant,

vs.

NICK KUPOFF, JAMES ZUKOEV, MIKE KITOFF, and NICK KABAK, a partnership doing business as North Star Mining Company,
Appellees.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

The statement of appellant's brief substantially recites the facts of the case except in significantly omitting to advise the court that the appellees did not leave the premises as alleged by them purely as a result of a suit by Stepovich, but were evicted by a marshal's execution, resulting from a non-founded suit instigated by Stepovich.

All of these facts have been fully covered on a prior appeal and fully discussed before this court in such appeal. (See *Kupoff v. Stepovich,* 184 F. 2d, 705.)

ARGUMENT.

The appellees will confine the argument solely to the two points raised by the appellant.

I.

(A) THE SUFFICIENCY OF THE EVIDENCE INTRODUCED IN ADDITION TO THAT OF THE TESTIMONY OFFERED BY THE APPELLEES.

(B) APPELLEES OFFERED AMPLE COMPETENT PROOF TO FURNISH A BASIS FOR COMPUTING THE DAMAGES RESULTING IN JUDGMENT IN FAVOR OF THE APPELLANT.

Appellees introduced sufficient independent evidence entitling them to a verdict and judgment.

The Alaskan Statute governing decedents' estates does not preclude an interested party from testifying except that such testimony must in some manner be corroborated by some species of proof, all of which had been done in this case, as is borne out by the record on appeal.

The partial discussion having reference to the statute has been made in the prior opinion of this court in *Kupoff v. Stepovich* (supra). The sufficiency of such proof has been tested in numerous prior decisions, including the Oregon courts from which the Alaska Statute has evolved. In the case of *In Re Hattrem's Estate,* 135 P. 2d 775, 777, where a cause of action has been instituted and the claim was rejected for attorney's fees against the estate of the deceased, the court, in commenting on the competency and sufficiency of independent proof, stated as follows:

"By reverting to the language of the statute, it will be seen that it was only 'the testimony of the claimant' which is excluded from the category of corroborative proof; in fact, it is 'the testimony of the claimant' which requires corroboration. Applying the rule of expressio unius est exclusio alterius, it is evident that all species of evidence, other than 'the testimony of the claimant,' is competent, satisfactory corroborative proof. * * *."

In the case of *In Re Johnson's Estate,* 164 P. 2d, 886, where the construction and the liberality allowed by the court with respect to competency of witnesses in regard to claim against estates, the court stated as follows:

"* * * Our statute provides that no claim which has been rejected by an executor or administrator shall be allowed by any court 'except upon some competent satisfactory evidence other than the testimony of the claimant'. Section 19-704, O.C.L.A. Competent corroborative proof, therefore, includes 'all species of evidence, other than "the testimony of the claimant".' *In re Hattrem's Estate* (supra). The law of Oregon is liberal in respect of the competency of witnesses, and effects no exclusion either of parties or 'other persons who have an interest in the event'. Section 3-102, O.C.L.A. Cf Barton v. Dyer, 38 Idaho 1, 220 P. 488."

In the case of *Franklin v. Northrup,* 215 P. 494, where the claimant attempted to spell out an implied promise to pay for rendition of services, the Supreme

Court of Oregon, at page 499, citing the specific section and numerous decisions, stated as follows:

> "Defendant contends that the testimony of plaintiff relating both to her claim for services and to her claim for money expended for the support of the deceased lacks the corroboration required by statute, and in support of that contention cites section 1241 Or. L.; Goltra v. Penland, 45 Or. 254, 77 Pac. 129; Consor v. Andrews, 61 Or. 483, 123 Pac. 46.
>
> "Section 1241, Or. L., directs:
> * * * 'That no claim which shall have been rejected by the executor or administrator * * * shall be allowed by any court, referee, or jury, except upon some competent or satisfactory evidence other than the testimony of the claimant.'
>
> "As to the facts and circumstances and the acts and conduct of the parties upon which plaintiff relies to raise an implied promise of the decedent to pay for services performed by plaintiff, the testimony of plaintiff was sufficiently corroborated to warrant a finding by the trial court of an implied contract between plaintiff and deceased, obligating the latter to pay plaintiff the reasonable worth of the services of value performed by plaintiff in behalf of decedent."

The case of *Krikorian v. Dailey,* 197 S.E. 442 (449) is particularly applicable in that there is some similarity in the factual aspects of the case. The action involved an eviction of a tenant by a landlord and a suit for damages by the tenant. The court, in construing a very similar statute in effect in the State of Virginia, stated as follows:

"* * * No universal rule can be applied. Each case turns upon its own facts.

"* * * The statute only requires that 'there should be such corroboration as would confirm and strengthen the belief of the jury in the testimony', of such adverse witnesses. Burton's Ex'r v. Manson, 142 Va. 500, 129 S.E. 356, 359; Davies v. Silvey, 148 Va. 132, 138 S.E. 513; Cannon v. Cannon, 158 Va. 12, 163 S.E. 405. * * *"

The same statute, being tested in the District of Columbia, and having been passed on for comment by the United States Court of Appeals for the District of Columbia, as reported in the case of *Rosinski v. Whiteford,* 184 F. 2d 700 (p. 701), is amply persuasive of the proposition that any corroborative evidence is sufficient to meet the requirements of the statute. We quote:

"* * * 'It is not necessary that corroborative evidence required by this statute be sufficient to support a judgment.' Shenandoah Valley Nat. Bank v. Lineburg, 179 Va. 734, 739, 20 S.E. 2d 541, 544. We agree with the Virginia court. We think the statute permits a judgment based essentially on the survivor's testimony if there is other evidence from which reasonable men might conclude that his testimony is probably true. * * *".

Distinguishing authorities cited by appellant.

It is worthwhile to call attention to some of the cases cited by the appellant which are distinguishable in the following respects:

In Re Berger's Estate, 25 P. 2d, 138.

This particular case involved a partnership and was totally devoid of any species of corroborative proof. *In Re Millon's Estate,* 61 P. 2d, 1030.

This case, quoted by appellant, involved a board and room claim and the testimony was confined strictly to that of the claimant and totally absent of any other facts from which any corroboration could either be implied or inferred.

II.

APPELLEES' PROOF RELATING TO DAMAGES WAS SUFFICIENT IN ALL RESPECTS TO SUPPORT THE AWARD FOR DAMAGES.

The case of *Eastman Co. v. Southern Photo Co.,* 273 U.S. 359 (p. 379), involved a suit brought against the corporation for the injury to the plaintiff's business, and the question of determining damages in the absence of a precise rule was fully discussed by the court. The court has stated the sound principle that where a wrong has been committed, particularly one occasioned by the defendant, recovery will not be precluded because damages cannot be established with a scientific precision. Quoting:

> "* * * 'Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate.' This, we think, was a correct statement of the applicable rules of law. Furthermore, a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not en-

titled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible. *Hetel v. Baltimore & Ohio R.R.,* 169 U.S. 26, 39. And see *Lincoln v. Orthwein* (C.C.A.), 120 Fed. 880, 886.

"We conclude that plaintiff's evidence as to the amount of damages, while mainly circumstantial, was competent; and that it sufficiently showed the extent of the damages, as a matter of just and reasonable inference, to warrant the submission of this question to the jury. The jury was instructed, in effect, that the amount of the damages could not be determined by mere speculation or guess, but must be based on evidence furnishing data from which the amount of the probable loss could be ascertained as a matter of reasonable inference. And the questions as to the amount of the plaintiff's damages having been properly submitted to the jury, its determination as to this matter is conclusive."

The same doctrine is followed in a somewhat later decision, in the case of *Story Parchment Co. v. Paterson Co.,* 282 U.S. 555 (p. 564) where the defendants raised a question that damages had been speculatively indulged in. The court, in following the earlier reasoning in the *Eastman* case, among other things, upheld the trial court's instructions, which were as follows:

" 'Juries are allowed to act upon probable and inferential, as well as direct and positive proof. And when, from the nature of the case, the amount of the damages can not be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before

> the jury all the facts and circumstances of the case having any tendency to show damages, or their probable amount; so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit.' ".

In the case of *Student's Book Company v. Washington Book Company,* 232 F. 2d, 49, in an action for damages based on alleged book sales to plaintiff's competitors, at preferential prices in violation of the Robinson-Patman Act, the Circuit Court of Appeals for the District of Columbia, in commenting on the barometer used in arriving at their damages, stated as follows:

> "There is, of course, no accurate way of determining the amount of appellant's loss due to competition as against the amount due to discrimination. The 'rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount.' . . .
>
> "The problem is not a new one. In damage suits brought under the antitrust laws, the Supreme Court has held that the nature of the subject matter is such that the jury must be allowed to base its determination of damages upon 'probable and inferential' proof."

In the case of *Leader Clothing Company v. Fidelity & Casualty Co. of N.Y.,* 237 F. 2d 7, in determining the loss covered by an insurance policy and the method of establishing damages, the court stated:

> "When it is once established with certainty that a loss covered by the policy has occurred, it is not necessary to a recovery that the amount must be proved with mathematical accuracy, where that is impossible. Where, as here, the amount of the damages is difficult of ascertainment, as said by the Supreme Court, it would be a perversion of justice to deny all relief to the injured person under such circumstances. It is enough if there is a basis for a reasonable inference as to the extent of the damages."

A reading of the authorities clearly indicates the particular trend that where a party has been wronged, the failure to establish damages with the precise measurement of a yardstick is not a bar to recovery.

In the instant cause tried before the court the plaintiff did, however, fully, abundantly and amply establish values, actual physical losses by virtue of having been ousted prior to the termination of the lease, and has evolved a denifite guide under the careful instructions of the court for the jury to draw such direct inferences based upon the testimony, to arrive at the verdict.

The case cited by the appellant, *Twin Lakes H. Gold Min. Syndicate v. Colorado M. Ry. Co.,* 27 P. 258, holds clearly in favor of the appellees and in support of the appellee's contention the following excerpt is quoted from such opinion:

> "* * * Here there was no question in regard to the character. Its character as mineral land was conceded. It was so regarded in the contract, and recognized as being actually occupied and

worked as placer mines. But such conclusive characterization did not fix its value. It might, as mineral land, be worth no more than five dollars per acre, the price fixed by law; it might be worth thousands. What the value was, was the question to be determined by the jury from the evidence. * * *".

In the case of *Anvil Mining Company v. Humble,* 153 U.S. 540, 549, cited by appellant and characterized as the determining case in laying down the rules in fixing damages in mining cases, intended as conclusive authority for the appellant, bears out a contrary reasoning. The court there stated as follows:

" 'If the jury find from the evidence that the plaintiffs were in good faith endeavoring to carry out and perform said contract according to its terms, and the defendant wantonly or carelessly and negligently interfered with and hindered and prevented the plaintiff in such performance to such an extent as to render the performance of it difficult, and greatly decrease the profits which the plaintiff would otherwise have made, then and in such case such interference was unauthorized and illegal and would have justified the plaintiffs in abandoning the contract, and would have entitled them to recover such damages as they actually suffered by being hindered and prevented from performing such contract.' "

"* * * A party who engages to do work has a right to proceed free from any let or hindrance of the other party, and if such other party interferes, hinders, and prevents the doing of the work to such an extent as to render its performance difficult and largely diminish the profits, the first

may treat the contract as broken, and is not bound to proceed under the added burdens and increased expense. It may stop and sue for the damages which it has sustained by reason of the non-performance which the other has caused."

"These are all the questions that we deem it important to consider. We have examined the record very carefully, and find nothing in the rulings of the court of which the defendant can justly complain; and while, in view of the conflicting testimony, there is room for difference of opinion as to what the facts really were, there was testimony which, in amount and character, was sufficient to uphold the verdict of the jury, and, of course, under those circumstances, its determination is conclusive upon those questions of fact. The judgment will be *Affirmed.*"

The court below very carefully instructed the jury to award the plaintiffs no speculative damages, no anticipated losses or profits—to allow nothing which may appear conjectural or speculative. (Tr. pp. 27-28.)

The jury's verdict could only have been arrived at after deliberation and study of the testimony as offered and based solely upon such testimony.

CONCLUSION.

It is clearly apparent that the defendant has evicted these plaintiffs, breached the lease, precluded the plaintiffs from pursuing operations upon realizing that further exploration of the leased area was prov-

ing fruitful, and appellant thus became liable for the consequential damages.

The judgment should, therefore, be affirmed.

Dated, Fairbanks, Alaska,
October 15, 1958.

Respectfully submitted,
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